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7 NOT FOR CITATION
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 KEVIN COOPER,

13 Plaintiff,

14 v.

15 RICHARD A. RIMMER, Acting Director of the
16 California Department of Corrections, and
JEANNE S. WOODFORD, Warden of California
State Prison at San Quentin,

17 Defendants.
18

Case Number C 04 436 JF

DEATH PENALTY CASE

ORDER DENYING MOTIONS FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION AND FOR EXPEDITED
DISCOVERY

[Docket Nos. 3 & 6]

19 Plaintiff Kevin Cooper moves for a temporary restraining order or preliminary injunction
20 and for expedited discovery. Defendants Richard A. Rimmer, Acting Director of the California
21 Department of Corrections, and Jeanne S. Woodford, Warden of California State Prison at San
22 Quentin, oppose the motions. The Court has read the moving and responding papers and has
23 considered the oral arguments of counsel presented on Thursday, February 5, 2004. For the
24 reasons set forth below, the motions will be denied.

25 **I. BACKGROUND**

26 Plaintiff has been sentenced to death. He is scheduled to be executed by lethal injection
27 just after midnight on Tuesday, February 10, 2004. On Monday, February 2, 2004, Plaintiff filed
28 the present action pursuant to 42 U.S.C. § 1983 (2004). Plaintiff seeks injunctive relief to

1 prevent Defendants from executing him pursuant to California's lethal injection protocol because
2 he contends that lethal injection performed pursuant to that protocol inflicts unnecessary pain
3 and torture in violation of his Eighth Amendment right to be free from cruel and unusual
4 punishment.

5 **II. LEGAL STANDARD**

6 As a general rule, a party seeking a preliminary injunction must show either (1) a
7 likelihood of success on the merits and the possibility of irreparable injury or (2) the existence of
8 serious questions going to the merits and the balance of hardships tipping in the movant's favor.
9 See Roe v. Anderson, 134 F.3d 1400, 1401-02 (9th Cir. 1998); Apple Computer, Inc. v. Formula
10 Int'l, Inc., 725 F.2d 521, 523 (9th Cir. 1984). These formulations represent two points on a
11 sliding scale in which the required degree of irreparable harm increases as the probability of
12 success decreases. See Roe, 134 F.3d at 1402.

13 **III. DISCUSSION**

14 **A. Jurisdiction**

15 Defendants contend that Plaintiff should have filed a petition for a writ of habeas corpus
16 pursuant to 28 U.S.C. § 2254 (2004) rather than a civil rights action pursuant to 42 U.S.C. § 1983
17 (2004) to challenge California's lethal injection protocol. The question as to which of these
18 statutes provides the proper means for raising a challenge to a method of execution presently is
19 before the United States Supreme Court in Nelson v. Campbell, cert. granted, 124 S.Ct. 835
20 (2003). However, the United States Court of Appeals for the Ninth Circuit, whose precedent is
21 controlling in this case pending the decision in Nelson, has held that "a challenge to a method of
22 execution may be brought as a § 1983 action." Fierro v. Gomez, 77 F.3d 301, 305-06 (9th Cir.),
23 vacated on other grounds, 519 U.S. 918 (1996). Accordingly, this Court has jurisdiction over
24 Plaintiff's claims pursuant to § 1983.

25 **B. Undue Delay**

26 Although Plaintiff has been seeking review of his conviction and death sentence in state
27 and federal courts for more than a decade, he filed the instant challenge to California's lethal
28

1 injection method of execution only eight days prior to his scheduled execution date. Plaintiff's
2 explanation for the delay, which includes alleged failures in representation by prior counsel,
3 difficulty in securing appointment of new counsel, new counsel's competing responsibilities in
4 preparing a clemency petition and conducting investigations, and an alleged ripeness bar to an
5 earlier presentation of his claims, does not establish cause under applicable law for his failure to
6 raise this challenge at an earlier time. See Gomez v. U.S. Dist. Ct. N.D. Cal., 503 U.S. 653, 653-
7 54 (1992) (holding that a court may consider the last-minute nature of an application to stay
8 execution in deciding whether to grant equitable relief).

9 Although the Court does not doubt the truth of new counsel's representations, it is evident
10 that Plaintiff, who has been and is being assisted by a number of different lawyers and legal
11 organizations, had sufficient legal resources to bring the present action sooner. In the last month
12 alone, the United States Supreme Court has declined to grant or has vacated stays granted to
13 death row inmates filing last-minute challenges to lethal injection. See, e.g., Vickers v. Johnson,
14 No. 03A633, 2004 WL 168080 (U.S. Jan. 28, 2004) (stay of execution denied); Zimmerman v.
15 Johnson, No. 03A606, 2004 WL 97434 (U.S. Jan. 21, 2004) (same); Beck v. Rowsey, 124 S.Ct.
16 980 (Jan. 8, 2004) (stay of execution vacated). Absent a compelling justification for bringing
17 this action at the eleventh hour, such as a material change in the applicable law or factual
18 circumstances or an exceptionally strong showing on the merits, this Court may not simply
19 ignore such clear guidance from the Supreme Court. Moreover, such challenges inappropriately
20 force the Court to make an otherwise unnecessary choice between orderly consideration of the
21 plaintiff's claims and "the state's interest in the finality of convictions that have survived direct
22 review in the state court system." See Calderon v. Thompson, 523 U.S. 538, 555 (1998).¹

25 ¹While the stated objective of the present action is to address alleged deficiencies in
26 California's lethal injection protocol, the timing of its filing reasonably suggests that an equally
27 important purpose of the action is to stay Plaintiff's execution so that Plaintiff may continue to
28 pursue claims going to the validity of his conviction.

1 **C. Merits**

2 The Eighth Amendment prohibits punishments involving “unnecessary and wanton
3 infliction of pain,” Estelle v. Gamble, 429 U.S. 97, 103 (1976) (internal quotation marks and
4 citations omitted), or that are inconsistent with “evolving standards of decency that mark the
5 progress of a maturing society,” id. at 102 (internal quotation marks and citations omitted).
6 Punishments involving “torture or a lingering death” violate the Eighth Amendment, In re
7 Kemmler, 136 U.S. 436 (1890), and when analyzing a particular method of execution, it is
8 appropriate to focus “on the objective evidence of the pain involved,” Fierro, 77 F.3d at 306
9 (citing Campbell v. Wood, 18 F.3d 662, 682 (9th Cir.), cert. denied, 511 U.S. 1119 (1994)
10 (concluding that hanging, when conducted under the state of Washington’s protocol, did not
11 constitute cruel and unusual punishment)).

12 Plaintiff maintains that the three-drug protocol² used for executions in California will
13 subject him to an unreasonable risk of unnecessary pain. Specifically, Plaintiff alleges that the
14 use of the paralytic agent pancuronium bromide (the second drug administered, also known as
15 Pavulon) is inhumane. According to Plaintiff and his experts, Pavulon prevents movement and
16 thus prevents observers from knowing whether the condemned person is experiencing great pain.
17 Plaintiff also alleges that the anesthesia used in execution, sodium pentothal, is short-acting and
18 unreliable. Finally, Plaintiff alleges that the protocol as a whole is vague and without adequate
19 safeguards, pointing to previous executions in which prisoners may have died a painful death.

20 Even if Plaintiff’s delay in bringing this action were to be ignored or excused, this Court
21 would find and conclude that Plaintiff has not met his burden of demonstrating either the
22 likelihood of success on the merits or the existence of serious questions going to the merits.
23 While thirty-seven states and the federal government authorize lethal injection as a method of
24 execution, not a single court has held that lethal injection violates the Eighth Amendment. To

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26 ²Stated simply, the protocol involves the administration of an anesthetic intended to
27 render the prisoner unconscious, followed by a paralytic to prevent involuntary movement,
followed by potassium chloride, which stops the prisoner’s heart.

1 the contrary, every state and federal court that has considered the issue has concluded that lethal
2 injection is constitutional. See, e.g., LaGrand v. Lewis, 883 F. Supp. 469, 470-71 (D. Ariz.
3 1995) (citing cases), aff'd, 133 F.3d 1253 (9th Cir.), cert. denied, 525 U.S. 971 (1998); People v.
4 Snow, 65 P.3d 749, 800-01 (Cal.), cert. denied, 1245 S.Ct. 922 (2003); Poland v. Stewart, 117
5 F.3d 1094, 1105 (9th Cir. 1997), cert. denied, 523 U.S. 1082 (1998) (finding petitioner had failed
6 to demonstrate that Arizona's lethal injection protocol would violate his constitutional rights).³

7 Further, at least two courts that have examined lethal injection protocols that, like
8 California's, include the use of both sodium pentothal and Pavulon have held on a fully-
9 developed record that such protocols are constitutional. See State v. Webb, 750 A.2d 448, 453-
10 57 (Conn.), cert. denied, 521 U.S. 835 (2000); Sims v. State, 754 So.2d 657 (Fla.), cert. denied,
11 528 U.S. 1183 (2000). Defendants' expert also has declared that in light of the large dose of
12 sodium pentothal administered pursuant to California's protocol there is only "approximately a
13 0.00006% probability that [a] condemned inmate given [the dose] would be conscious, and able
14 to experience pain, after a period of five minutes." Defs' Ex. C at 3.

15 Nor has Plaintiff met his burden of showing that the use of Pavulon is inhumane and
16 unnecessary. According to Defendants and their experts, a principal purpose of Pavulon is to
17 stop an inmate's breathing. Plaintiff has not articulated a compelling argument that this is not a
18 legitimate state interest in the context of an execution.

19 Finally, Plaintiff's argument that the lethal injection protocol used in California is
20 unconstitutionally vague does not present a serious question going to the merits. "Written
21 procedures are not constitutionally infirm simply because they fail to specify in explicit detail the
22 execution protocol." LaGrand, 883 F.Supp. at 470.

23 While opponents of the death penalty understandably argue that no method of execution
24 can be humane, there is ample legal authority that lethal injection also "comports with current
25 societal norms" regarding execution. Id. at 471. As noted, virtually all states and the federal

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27 ³See also Defs.' Opp'n App. T.R.O. at 13, n.8, and cases cited therein.

1 government utilize lethal injection as a means of execution. Legislative trends towards imposing
2 a particular punishment are relevant evidence of whether a punishment is cruel and unusual.
3 Fierro, 77 F.3d at 306 n.4 (citing Trop v. Dulles, 356 U.S. 86, 102 (1958) (plurality opinion)).

4 In sum, Plaintiff has done no more than raise the possibility that California's lethal-
5 injection protocol unnecessarily risks an unconstitutional level of pain and suffering. As he has
6 neither demonstrated the likelihood of success on the merits nor serious questions going to the
7 merits, he is not entitled to injunctive relief.⁴

8 IV. DISPOSITION

9 Any case involving the death penalty inevitably raises serious moral, ethical, and legal
10 questions about which people of good will continue to disagree. In Plaintiff's case there also
11 appear to be questions concerning the underlying conviction that have been and continue to be
12 the subject of impassioned debate. The present case, however, concerns the discrete question of
13 whether Plaintiff has met the legal standard for enjoining California's use of lethal injection as a
14 method of execution. Because the Court finds and concludes that Plaintiff has not met this
15 standard and has delayed unduly in asserting his claims, and good cause therefor appearing, IT IS
16 HEREBY ORDERED:

- 17 (1) Plaintiff's motion for a temporary restraining order or preliminary injunction is
18 DENIED;
19 (2) Plaintiff's motion for expedited discovery is DENIED as moot.

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21 DATED: February 6, 2004

/s/ (electronic signature authorized)
JEREMY FOGEL
United States District Judge

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25 ⁴Given the stark finality of the death penalty, there can be no question that Plaintiff will
26 suffer irreparable injury in the absence of injunctive relief. However, in the Ninth Circuit, "even
27 if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an
28 irreducible minimum that there is a fair chance of success on the merits." Johnson v. California
State Bd. Of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995).

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